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Abdul Azhim bin Mohammad v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05(M)-558–12 OF 2019
KAMALUDIN MD SAID, SUPANG LIAN AND AHMAD NASFY JJCA
24 MAY 2023

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Criminal Law — Murder — Prima facie case established — Accused charged with offence of murder — Trial judge found prima facie case established — Trial judge relied on circumstantial evidence and confession by accused — Ingredients to be proved for application of s 300(c) of Penal Code — Whether ingredients for offence of murder fulfilled — Whether prima facie case established — Whether finding of prima facie case by trial judge wrong — Evidence Act 1950 s 17(2) — Penal Code ss 300(c) & 302

D

Criminal Procedure — Defence — Unsoundness of mind — Accused charged with offence of murder — Accused raised defence of unsoundness of mind under s 84 of Penal Code — Trial judge found defence not established — Whether defence of unsoundness of mind established — Whether trial judge failed to appreciate defence — Whether prosecution's case proven beyond reasonable doubt — Penal Code s 84

E

F

Evidence — Expert evidence — Conflicting testimony — Accused charged with offence of murder — Accused raised defence of unsoundness of mind — Accused's expert testified that accused suffered major depressive disorder — Prosecution's expert testified that accused did not suffer from major depressive disorder — Whether trial judge had right to prefer one expert opinion over the other

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This was a tragic case of murder which occurred in a storeroom near a pantry of a vocational college's administration office located in Banting, Selangor. The accused was charged for such an offence which was punishable under s 302 of the Penal Code ('the PC'). The prosecution's case was based on the testimonies of several witnesses, inter alia: (a) an employee of the college who was also the accused's best friend ('SP18') who testified that the accused had confessed to her that he had murdered the deceased due to old grudge; (b) a police constable ('SP1') who was on duty at Banting Police Station testifying that she had received a call from the accused who had made a confession that he had stabbed the deceased and subsequently strangled her to death; and (c) the pathologist ('SP20') who had confirmed that the death of the deceased was caused by asphyxia due to compression on the neck. The learned trial judge found that

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prima facie case was established by the application of cl (c) of s 300 of the Penal Code. The accused raised the defence of unsoundness of mind under s 84 of the PC and submitted that prior to the incident, he heard a voice asking him to kill the deceased. In support of his case, the accused relied on the evidence of his mother ('SD2') and the prison medical officer ('SD3') who testified that the accused was diagnosed with major depressive disorder. The prosecution then called the Consultant Forensic Psychiatrist of Hospital Bahagia Ulu Kinta ('SP29') as rebuttal witness. The accused was referred to SP29 on three occasions and based on the assessment carried out by SP29 on the accused, he opined that the accused did not suffer major depressive disorder and that at the time of the offence, the accused was aware of what he was doing and that he was aware of the nature of his offence and capable of understanding what he had done was wrong and against the law. At the end of the trial, the learned trial judge found that the defence of unsoundness of mind was not proven and as such, the prosecution had established its case beyond reasonable doubt. The learned trial judge then convicted the accused and sentenced him to death ('the decision'), hence, the present appeal. In the present appeal, the accused submitted that the decision must be reversed on the following grounds: (i) that the finding on the prima facie case was wrong and could not stand scrutiny; and (ii) for want of appreciation of the defence's case; that the defence of unsoundness of mind, having been proved had escaped the attention of the learned trial judge.

Held, dismissing the appeal, and affirming the conviction and sentence imposed by the High Court:

(1) It was trite that for the prosecution to establish an offence of murder punishable under s 302 of the PC, the prosecution must prove that the deceased died as a result of the injuries suffered; the injuries were caused by the accused; and the accused's act came within one or a combination of the limbs under s 300 of the PC. In the present case, the prosecution had relied on cl (c) of s 300 of the PC, the ingredients of which were provided in the Federal Court decision in the case of *Zulkiple bin Mohamad v Public Prosecutor* [2022] 1 MLJ 479. The intention to cause death was not an ingredient to be proved for the application of cl (c) of s 300 of the PC (see paras 15, 17 & 32).

(2) The evidence showed that the deceased died on 11 July 2018 between 1.30pm and 3pm. The pathologist found two stab wounds on the deceased's body, but these wounds were not fatal. The pathologist explained that the death of the deceased was caused by asphyxia due to compression on the neck. The pathologist further stated that the multiple contusions on lower jaw of the deceased were due to compression by fingers (hands). Based on the above evidence, it was clear that the prosecution had satisfied the first two ingredients. As such, only two

more ingredients were left ie, the identity of the person who inflicted the injury and the element of intention to inflict that injury (see paras 19–21).

(3) The prosecution had relied on circumstantial evidence to prove the two elements because there was an absence of an ocular witness. It was a trite law that circumstantial evidence could be the sole basis for a conviction provided that the condition precedents before conviction on circumstantial evidence were fully established. In the present case, the court agreed with the learned trial judge that there was sufficient circumstantial evidence that proved the nexus between the appellant and the deceased's death. The evidence included the recovery of a knife with the accused's blood stains near the deceased, the testimonies of the witnesses that there was no other person at the crime scene at the material time, the CCTV recording which showed the accused's movement from the pantry towards the store while holding a knife, and the accused's confession (under s 17(2) of the Evidence Act 1950) voluntarily made to SP18 who was a credible witness (see paras 22–24, 26 & 29–31).

(4) The circumstantial evidence clearly showed intention ie, the accused brought along a lethal weapon when he met the deceased equated to preparatory act consistent with premeditation. If the stab wounds were not fatal, death was a certainty when the deceased's neck was compressed resulting in failure of oxygen to enter the vital organs. The court agreed with the learned trial judge that the act of the appellant left no doubt that the intention must have been to take the deceased's life. Therefore, when taken together, it was clear that the injuries were not accidental or unintentional. Based on the above findings, it was clear that the learned trial judge had not misdirected himself in law and in facts in deciding that the prosecution had established a prima facie case on maximum evaluation against the appellant for the offence of murder within cl (c) of s 300 of the PC (see paras 35 & 37).

(5) It was a trite law that the appellant must establish unsoundness of mind as prescribed under s 84 of the PC to exonerate the appellant from the offence charged against him. Hence, the burden was shouldered by the defence to prove this defence on the balance of probabilities. This was consistent with s 105 of the Evidence Act 1950. When a defence of unsoundness of mind was raised, a two-stage test was applicable. Firstly, there must be a finding upon medical evaluation that the accused was suffering from some kind of psychiatric condition that impaired his cognitive faculties at the material time so as to be classified as being medically unsound mind. This was of course a matter for a medical expert to determine. Secondly, in order to be legally of unsound mind, the court had to determine that by reason of the psychiatric condition the accused had lost his cognitive faculties to a degree such that he was

incapable of knowing the nature of his act or what he was doing was wrong or contrary to the law (see paras 40 & 42).

(6) In the present case SD3 opined that the appellant suffered major depressive disorder, whilst SP29 was of the view that the appellant did not suffer from major depressive disorder. In this situation the learned trial judge had a right to prefer one opinion to the other and it was a trite law that a finding that the opinion of one expert witness was to be preferred to that of another was not likely to be disturbed by the appellate court because it was finding made after the trial judge had carefully weighed the respective theories based upon the value, impressiveness and reliability of the expert evidence. In any event, having scrutinized the totality of the evidence, the court agreed with the learned trial judge that the evidence of SP29 as being credible evidence in comparison with the evidence of SD3. The court therefore found that the appellant had failed to establish the defence under s 84 of the PC. For the above reasons, the court found that the conviction of the appellant was safe (see paras 46–49).

[Bahasa Malaysia summary

Ini adalah kes pembunuhan tragis yang berlaku di bilik stor berhampiran pantri sebuah pejabat pentadbiran kolej vokasional yang terletak di Banting, Selangor. Tertuduh didakwa atas kesalahan tersebut yang boleh dihukum di bawah s 302 Kanun Keseksaan ('KK'). Kes pendakwaan adalah berdasarkan keterangan beberapa saksi, antara lain: (a) seorang pekerja kolej tersebut yang juga rakan baik tertuduh ('SP18') yang memberi keterangan bahawa tertuduh telah mengaku kepadanya bahawa dia telah membunuh si mati kerana dendam lama; (b) seorang konstabel polis ('SP1') yang bertugas di Balai Polis Banting memberi keterangan bahawa dia telah menerima panggilan daripada tertuduh yang telah membuat pengakuan bahawa dia telah menikam si mati dan seterusnya mencekiknya sehingga mati; dan (c) pakar patologi ('SP20') yang telah mengesahkan kematian si mati disebabkan oleh asfiksia akibat tekanan pada leher. Hakim bicara yang bijaksana mendapati bahawa kes prima facie telah dibuktikan melalui pemakaian klausa (c) s 300 Kanun Keseksaan. Tertuduh membangkitkan pembelaan tidak sempurna akal di bawah s 84 KK dan berhujah bahawa sebelum kejadian, dia mendengar suara memintanya membunuh si mati. Bagi menyokong kesnya, tertuduh bergantung kepada keterangan ibunya ('SD2') dan pegawai perubatan penjara ('SD3') yang memberi keterangan bahawa tertuduh disahkan menghidap kecelaruan episod kemurungan major. Pihak pendakwaan kemudian memanggil Pakar Perunding Psikiatri Forensik Hospital Bahagia Ulu Kinta ('SP29') sebagai saksi sanggahan. Tertuduh dirujuk kepada SP29 sebanyak tiga kali dan berdasarkan penilaian SP29 ke atas tertuduh, beliau berpendapat tertuduh tidak mengalami kecelaruan episod kemurungan major dan ketika melakukan kesalahan, tertuduh sedar tentang apa yang dilakukannya dan bahawa dia sedar tentang sifat kesalahannya dan mampu memahami apa yang dia telah lakukan

adalah salah dan bertentangan dengan undang-undang. Pada akhir perbicaraan, hakim bicara yang bijaksana mendapati bahawa pembelaan tidak sempurna akal tidak dibuktikan dan oleh itu, pihak pendakwaan telah membuktikan kesnya melampaui keraguan munasabah. Hakim bicara yang bijaksana kemudian mensabitkan tertuduh dan menjatuhkannya hukuman mati ('keputusan tersebut'), justeru, rayuan semasa. Dalam rayuan semasa, tertuduh berhujah bahawa keputusan tersebut perlu diubah atas alasan-alasan berikut: (i) bahawa dapatan kes prima facie adalah salah dan tidak boleh dipertahankan; dan (ii) kerana tidak menghargai kes pembelaan; bahawa pembuktian pembelaan tidak sempurna akal telah terlepas daripada perhatian hakim bicara yang bijaksana.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman yang dikenakan oleh Mahkamah Tinggi:

(1) Sudah menjadi undang-undang yang mantap bahawa bagi membuktikan kesalahan pembunuhan yang boleh dihukum di bawah s 302 KK, pihak pendakwaan perlu membuktikan bahawa si mati telah meninggal dunia akibat kecederaan yang dialami; kecederaan yang dialami adalah disebabkan oleh tertuduh; dan perbuatan tertuduh termasuk dalam salah satu atau gabungan bahagian-bahagian di bawah s 300 KK. Dalam kes ini, pihak pendakwaan bergantung kepada klausa (c) s 300 KK, yang mana elemen-elemennya diperuntukkan dalam keputusan Mahkamah Persekutuan dalam kes *Zulkiple bin Mohamad v Public Prosecutor* [2022] 1 MLJ 479. Niat untuk menyebabkan kematian bukanlah satu elemen untuk dibuktikan bagi pemakaian klausa (c) s 300 KK (lihat perenggan 15, 17 & 32).

(2) Keterangan menunjukkan bahawa si mati meninggal dunia pada 11 Julai 2018 antara jam 1.30 petang hingga 3 petang. Pakar patologi menemui dua kesan tikaman pada badan si mati, tetapi luka tersebut tidak membawa maut. Pakar patologi menjelaskan bahawa kematian si mati berpunca daripada sesak nafas akibat tekanan pada leher. Pakar patologi selanjutnya menyatakan bahawa beberapa kesan lebam pada bahagian bawah rahang si mati adalah disebabkan oleh tekanan oleh jari (tangan). Berdasarkan keterangan di atas, adalah jelas bahawa pihak pendakwaan telah memenuhi dua elemen pertama. Oleh itu, hanya dua elemen lagi yang tinggal iaitu, identiti orang yang menyebabkan kecederaan tersebut dan elemen niat untuk mendatangkan kecederaan tersebut (lihat perenggan 19–21).

(3) Pihak pendakwaan bergantung kepada keterangan mengikut keadaan untuk membuktikan kedua-dua elemen tersebut kerana ketiadaan saksi mata. Ia adalah satu undang-undang yang mantap bahawa keterangan mengikut keadaan boleh menjadi asas tunggal untuk sabitan dengan syarat bahawa syarat duluan sebelum sabitan berdasarkan keterangan

A mengikut keadaan telah dipenuhi keseluruhannya. Dalam kes ini, mahkamah bersetuju dengan hakim bicara yang bijaksana bahawa terdapat keterangan mengikut keadaan yang mencukupi yang membuktikan pertalian antara perayu dan kematian si mati. Keterangan tersebut termasuklah penemuan sebilah pisau dengan kesan darah
B tertuduh berhampiran si mati, keterangan saksi-saksi bahawa tiada orang lain di tempat kejadian pada masa kejadian, rakaman CCTV yang menunjukkan pergerakan tertuduh dari pantri ke arah bilik setor sambil memegang pisau, dan pengakuan tertuduh (di bawah s 17(2) Akta Keterangan 1950) yang dibuat secara sukarela kepada SP18 yang
C merupakan saksi yang boleh dipercayai (lihat perenggan 22–24, 26 & 29–31).

(4) Keterangan mengikut keadaan jelas menunjukkan niat iaitu, tertuduh membawa senjata yang boleh membawa maut semasa dia bertemu
D dengan si mati adalah terjumlah kepada tindakan persediaan yang konsisten dengan persediaan awal. Sekiranya luka tikaman tersebut tidak membawa maut, kematian adalah satu kepastian apabila leher si mati dicekik mengakibatkan kegagalan oksigen memasuki organ-organ penting. Mahkamah bersetuju dengan hakim bicara yang bijaksana
E bahawa perbuatan perayu tidak menimbulkan keraguan bahawa niatnya adalah untuk mengambil nyawa si mati. Oleh itu, apabila kesemuanya dipertimbangkan, jelas bahawa kecederaan tersebut bukan secara tidak sengaja atau tidak disengajakan. Berdasarkan dapatan-dapatan di atas, adalah jelas bahawa hakim bicara yang bijaksana tidak tersalah arah
F dirinya dalam undang-undang dan fakta dalam memutuskan bahawa pihak pendakwaan telah membuktikan kes prima facie pada penilaian maksimum terhadap perayu bagi kesalahan membunuh dalam klausa (c) s 300 KK (lihat perenggan 35 & 37).

(5) Adalah menjadi undang-undang yang mantap bahawa perayu mesti
G membuktikan ketidaksempurnaan akal seperti yang ditetapkan di bawah s 84 KK untuk membebaskan perayu daripada kesalahan yang didakwa terhadapnya. Oleh itu, beban dipikul oleh pihak pembelaan untuk membuktikan pembelaan ini di atas imbangan kebarangkalian. Ini selaras dengan s 105 Akta Keterangan 1950. Apabila pembelaan
H ketidaksempurnaan fikiran dibangkitkan, ujian dua peringkat adalah terpakai. Pertama, perlu ada dapatan atas penilaian perubatan bahawa tertuduh mengalami sejenis keadaan psikiatri yang menjejaskan keupayaan kognitifnya pada masa yang material sehingga diklasifikasikan sebagai tidak sihat dari segi perubatan. Ini sudah tentu perkara yang perlu
I ditentukan oleh pakar perubatan. Kedua, untuk menjadi tidak sempurna akal dari segi undang-undang, mahkamah perlu memutuskan bahawa disebabkan keadaan psikiatri tertuduh yang telah kehilangan keupayaan kognitifnya sehingga satu tahap di mana dia tidak dapat mengetahui sifat perbuatannya atau apa yang dia lakukan adalah salah atau bertentangan

dengan undang-undang (lihat perenggan 40 & 42).

(6) Dalam kes ini SD3 berpendapat bahawa perayu mengalami kecelaruan episod kemurungan major, manakala SP29 berpendapat bahawa perayu tidak mengalami kecelaruan episod kemurungan major. Dalam situasi ini hakim bicara yang bijaksana mempunyai hak untuk memilih satu pendapat daripada yang lain dan telah menjadi satu undang-undang yang mantap bahawa dapatan di mana pendapat seorang saksi pakar lebih diutamakan daripada yang lain tidak boleh diganggu oleh mahkamah di peringkat rayuan kerana ia merupakan dapatan yang dibuat selepas hakim bicara telah mempertimbangkan dengan teliti setiap teori berdasarkan nilai, kesan dan kebolehpercayaan keterangan pakar. Walau apa pun, setelah meneliti keseluruhan keterangan, mahkamah bersetuju dengan hakim bicara yang bijaksana bahawa keterangan SP29 adalah keterangan yang boleh dipercayai berbanding dengan keterangan SD3. Oleh itu mahkamah mendapati bahawa perayu telah gagal untuk membuktikan pembelaan di bawah s 84 KK. Atas alasan-alasan di atas, mahkamah mendapati sabitan perayu adalah selamat (lihat perenggan 46–49).]

Cases referred to

Anandagoda v The Queen [1962] 1 MLJ 289, PC (folld)
Chan Chwen Kong v PP [1962] 1 MLJ 307, CA (refd)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232; [1983] CLJ Rep 721, FC (refd)
Goh Yoke v PP [1970] 1 MLJ 65, FC (refd)
Ho Sek Kong v PP [2011] 5 MLJ 359; [2011] 6 CLJ 522, CA (refd)
John a/k Nyumbei v PP [2007] 7 MLJ 206; [2007] 2 CLJ 509, CA (refd)
Juraimi Hussin v PP [1998] 1 MLJ 537; [1998] 2 CLJ 383, CA (refd)
Magendran a/l Mohan v PP [2011] 6 MLJ 1; [2011] 1 CLJ 805, FC (refd)
Mazlan bin Othman v Pendakwa Raya [2012] MLJU 1786; [2013] 1 CLJ 750, CA (refd)
Mc Lean v Weir [1997] 5 WWR 609 (refd)
Muhammad Jeffry bin Safii v PP [1997] 1 SLR 197, CA (refd)
PP v Zainal Abidin bin Mohd Zaid [1993] 1 CLJ 147, HC (refd)
PP v Misbah bin Saat [1997] 3 MLJ 495; [1998] 1 CLJ 759, HC (refd)
Rajagopal v PP [1977] 1 MLJ 6, FC (refd)
See Teow Koon v Kian Joo Can Factory Berhad [2016] MLJU 367; [2016] 1 LNS 375, HC (refd)
Tengku Jonaris Badlishah v PP [1999] 2 SLR 260, CA (refd)
Tiong Ing Soon (L) v PP [2019] 6 MLJ 542; [2019] 7 CLJ 341, CA (refd)
Virsa Singh v State of Punjab [1958] SC 465, SC (refd)
Zulkiple bin Mohamad v PP [2022] 1 MLJ 479; [2022] 1 CLJ 673, FC (refd)

Legislation referred to

Evidence Act 1950 s 3, 17, 17(2), 24, 105
Penal Code ss 84, 300, 300(c), 302

Appeal from: *Pendakwa Raya lwn Abdul Azhim bin Mohamad* [2020] MLJU 2466 (High Court, Shah Alam)

Muhammad Amirrul Jamaluddin (Salehuddin Saidin & Assoc) for the appellant.
Ng Siew Wee (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Ahmad Nasfy JCA (delivering judgment of the court):

INTRODUCTION

[1] This is yet again another horrid case of a life being ripped away in most tragic of circumstances. The loss of human life in this case is most horrid and as John Donne wrote in *Meditation XVII*, the death of any soul would diminish anyone involved in mankind. Lest we be accused of being swayed by emotions, which we are not, we made this observation to underscore the golden thread that runs through the corpus of criminal law that right to life is sacrosanct and must be protected and that no one should have his life taken away 'save in accordance with just law'.

[2] We now will hearken to the facts and the law upon which our decision rests.

[3] In the court below, the appellant was charged as follows:

> Bahawa kamu pada 11.07.2018 jam lebih kurang 1.30 petang sehingga jam 3.00 petang bertempat di alamat Kolej Vokasional Sultan Abdul Samad, Jalan Abdul Samad, di dalam Negeri Selangor Darul Ehsan, telah melakukan kesalahan membunuh sehingga menyebabkan kematian kepada seorang perempuan bernama Zaimah bt Mahmod (No. K/P: 611123-06-5122). Oleh yang demikian, kamu telah melakukan satu kesalahan membunuh dengan niat yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

[4] At the end of the prosecution's case the learned trial judge found that the prosecution had proved a prima facie case and the appellant was subsequently ordered to enter his defence.

[5] At the end of the defence's case, the appellant was found guilty. He was convicted and sentenced to death.

[6] Aggrieved with the said decision, the appellant filed the present appeal. We heard the submissions of the appellant and the respondent at length. The appellant and the respondent also relied on their written submissions which we have carefully considered. After all this case is about the loss of life and the punishment also involved the taking of another life and for that reason, we must ensure that the conviction is safe and free from error.

[7] Having considered the submissions and upon careful scrutiny of the records of appeal and the grounds of judgment of the learned trial judge, it is our unanimous decision that the appellant's appeal is without merit, and as such the appeal is dismissed. We now give our reasons.

THE PROSECUTION'S CASE

[8] We find that upon reading of the evidence as recorded in the records of appeal the facts are rather straightforward. We are grateful to the learned trial judge for setting out the narrative in the grounds of judgment. They are reproduced as follows:

(a) tertuduh telah dilantik sehagai Pembantu Makmal Gred 19 di Kolej Vokasional Sultan Abdul Samad ('Kolej'), Teluk Datok Banting. Namun begitu, tertuduh telah ditempatkan di pejabat pentadbiran dan kemudian ke bahagian perpustakaan melakukan kerja kerani sehingga hari kejadian;

(b) pada 11 Julai 2018 jam lebih kurang 8.30 pagi tertuduh telah pergi berjumpa Pembantu Makmal Encik Sakaran a/l Suppa (SP9) di bilik beliau yang terletak di pejabat Pentadbiran Kolej yang bersebelahan bilik Pengarah Kolej. Tertuduh memberitahu SP9 akan hasratnya untuk meminta tukar sekolah dan hendak berjumpa Pengarah Kolej;

(c) sebelum pergi ke bilik Pengarah, tertuduh pada jam kira-kira 9 pagi telah berjumpa rakan karibnya Pembantu Operasi Kolej, Cik Aidah Husna bt Berman (SP18) yang bertugas di kaunter pejabat pentadbiran yang sama. Tertuduh telah duduk di kerusi berhampiran kaunter sambil berbual dan menyatakan tertuduh ingin jumpa Pengarah;

(d) pada hari yang sama pada jam 9.25 pagi tertuduh telah pergi berjumpa dengan Pengarah Kolej Puan Norhayati bt Ab Wahab (SP22) meluahkan kerisauan tertuduh berkaitan peperiksaan yang akan dihadapinya pada bulan September 2018. Tertuduh menyatakan kepada SP22 bahawa beliau tidak boleh tidur dan tidak boleh belajar dan tidak boleh mengingat. Tertuduh juga menyatakan pada SP22 akan hasratnya untuk berpindah sekolah. Selepas dinasihati, tertuduh telah keluar dari pejabat SP22;

(e) selepas itu tertuduh masuk semula ke bilik SP9 dan memberitahu SP9 bahawa SP22 tidak membenarkan pertukaran. Kira-kira jam 10 pagi, tertuduh kemudian pergi berjumpa SP18 semula;

(f) tertuduh telah berjumpa SP18 di kaunter yang sama sambil memberitahu bahawa SP22 tidak membenarkan pertukaran dan memberitahu yang tertuduh ingin berhenti kerja. Kira-kira 11.30 pagi tertuduh telah pergi berjumpa SP9 dan SP18 nampak tertuduh bersama SP9 di bilik photostat;

(g) pada jam 12.30 tengahari SP18 telah pergi ke pantri. SP18 mendapati tertuduh berada di pantri sedang dalam keadaan menangis. SP18 bertanyakan tertuduh kenapa? Tertuduh memberitahu tiada apa-apa. SP18 kemudian keluar daripada pantri. Tertuduh telah berjumpa semula SP18 di kaunter sambil membantu SP18 membuat kerja. Kira-kira 1.30 petang SP18 telah pergi keluar makan tengahari dengan mengajak tertuduh tetapi tertuduh enggan mengikutnya. Menurut SP18 ketika itu SP18 nampak si mati berada dimeja beliau di pejabat pentadbiran tersebut dan tiada orang lain di pejabat;

(h) sebaik sahaja SP18 pergi makan tengahari lebih kurang jam 1.20 tengahari, cucu si mati Eliz Zulhany bt Azhari (SP14) datang berjumpa si mati di dalam pejabat pentadbiran kolej tersebut untuk mengambil telefon bimbit dan duit dari si mati. SP14 nampak tertuduh berada di bahagian kaunter. Semasa SP14 keluar meninggalkan pejabat, SP14 nampak tertuduh sedang bersandar di tepi kaunter sambil tersenyum pada beliau;

(i) sementara itu pada jam lebih kurang 1.37 tengahari Puan Wan Norhasni bt Wan Mamat (SP16) yang ketika itu telah berada di pejabat pentadbiran telah keluar dari bilik pejabat untuk pergi ke bilik solat di pantri. Ketika itu si mati berada di mejanya. Semasa melalui kaunter pejabat untuk ke pantri mengambil wuduk SP16 melihat tertuduh berada di depan kaunter tersebut. SP16 menuju ke pantri dan semasa SP16 mengambil wuduk SP16 terdengar pintu pantri dibuka dan nampak tertuduh masuk menuju ke sinki pantri dan membuka paip. SP16 kemudian pergi menunaikan solat di ruang solat dalam pantri tersebut. Selepas selesai solat, sekitar jam 1.58 petang SP16 dapati tiada sesiapa lagi dalam pantri dan SP16 pergi kembali ke meja beliau dalam pejabat pentadbiran;

(j) pada masa yang sama pensyarah Puan Norhayati bt Ali (SP19) telah pergi menunaikan solat dl ruang solat di bilik guru yang dipisahkan dengan dinding bersebelahan bilik mesyuarat dan stor pejabat pentadbiran kolej itu. Ketika SP19 sedang solat, SP19 telah terdengar bunyi jatuh dan berbunyi, Allah, Allahuakbar. Ketika solat itu juga SP19 mendengan Ustazah Azilah memanggil namanya. Selesai solat SP19 berjumpa Ustazah Azilah di bilik guru dan memberitahu apa yang didengarnya. Ustazah Azilah memberitahu turut mendengar bunyi yang sama. Kira-kira jam 1.45 petang SP19 dan Ustazah Azilah pergi mencari bunyi itu ke tingkat dua dan kemudian pergi ke pejabat pentadbiran kolej setakat sampai ke kaunter untuk mencari bunyi itu tetapi tiada sesiapa di situ. Kemudian SP18 sampai ke kaunter dan memberitahu SP19 bahawa beliau baru sahaja balik dari kantin;

(k) SP18 yang baru sahaja balik dari kantin jam 2.03 petang telah menyambung membuat kerja di kaunter pejabat pentadbiran kolej. Tidak beberapa lama selepas itu Puan Azliana Hidayah datang meminta kunci bilik makmal computer blok F daripada SP18. SP18 telah pergi ke bilik stor, SP18 nampak tertuduh sedang duduk di atas kotak sambil menggengam tangan dan memberitahu SP18 'Wei aku bunuh kak Zaimah'.Tertuduh juga meminta telefon dengan menyatakan 'Bak sini telefon kau (3 kali) aku nak telefon mak ayah aku, polis dan ambulance. Aku nak buat pengakuan yang aku bunuh kak Zaimah. Ini salah satu cara aku dibuang kerja'. SP18 kemudian terus mengambil kunci bilik makmal dan keluar daripada bilik stor pergi menyerahkan kunci bilik makmal dan keluar daripada bilik stor pergi menyerahkan kunci kepada Puan Azliana. SP18 telah mengambil telefon bimbitnya dan pergi semula ke bilik stor menyerahkan telefon kepada tertuduh. Tertuduh masih memberitahu SP18 bahawa beliau hendak telefon mak ayahnya dan hendak membuat pengakuan bahawa dia telah membunuh kak Zaimah. Kemudian SP18 keluar dari bilik stor pergi ke kaunter dan masuk semula ke bilik stor untuk mengambil kunci lain. Semasa masuk ke bilik stor ini, SP18 mendapati tertuduh sedang bercakap melalui telefon, 'mak saya bunuh seseorang'. Selepas mengambil kunci, SP18 keluar daripada bilik stor. Atas rasa tidak sedap hati SP18 pergi semula ke bilik stor menemui tertuduh. Tertuduh ketika itu memberitahu SP18, 'Aku tidak bunuh kamu sebab baik dan aku bunuh kak Zaimah sebab dendam', SP18 keluar semula dari bilik stor pergi ke kaunter. Ketika itu Pengarah Puan Norhayati bt Ab Wahab (SP22) dan beberapa cikgu sedang mencari si mati dan tertuduh. SP18 memberitahu tertuduh ada di bilik stor dan buat pengakuan dengannya bahawa tertuduh telah bunuh si mati. SP22 kemudian masuk ke bilik stor dan nampak Tertuduh sedang duduk di atas kotak. Apabila tertuduh nampak SP22 masuk, tertuduh memberitahu SP22 bahawa, 'Saya bunuh Zaimah, saya tikam Zaimah (si mati)'. SP22 bertanya pada tertuduh di mana Zaimah. Tertuduh menunjukkan ke penjuru bilik dalam bilik stor tersebut. SP22 tidak masuk melihat Zaimah tetapi telah keluar balik meminta pertolongan Cikgu Mohd Shahrizan bin Musa (SP23) untuk pergi ke stor melihat apa yang telah terjadi pada Zaimah. SP22 juga telah mengarah SP18 menghubungi polis dan *ambulance*;

(l) SP23 telah pergi menuju ke bilik mesyuarat pengurusan untuk ke bilik stor tetapi bilik berkunci. SP23 telah nampak tertuduh di dalam melalui cermin kaca dan meminta tertuduh membuka pintu. Tertuduh telah membuka pintu dan memberitahu SP23, 'Cikgu saya dah bunuh Puan Zaimah. Saya sudah telefon polis'. SP23 menanyakan tertuduh kenapa berbuat demikian. Tertuduh menyatakan, 'Dia ada dendam lama dengan Puan Zaimah sebab soal kes peribadi'. Tertuduh telah memberitahu si mati ada dalam bilik tempat letak fail (stor). SP23 masuk ke bilik stor dan didapati si mati dalam keadaan terbaring di atas lantai. SP23 kemudian keluar daripada bilik dan memaklumkan SP22,

(m) di Balai Polis Banting, Konstabel Nurul Nazua bt Md Omar (SP1) yang sedang bertugas di kaunter aduan pada jam lebih kurang 2.40 petang telah menerima panggilan daripada orang yang memperkenalkan diri sebagai

Abdul Azhim bin Mohamad memberitahu, 'Cik saya baru bunuh satu perempuan kerani nama Zaimah'. Pemanggil memaklumkan no kad pengenalannya 901003–14–6565. Pemanggil juga memberitahu, 'Saya tikam menggunakan pisau tetapi tak mati. Saya cekik sampai mati'. SP1 sempat bertanya beliau di mana dan dimaklumkan di Kolej Vokasional Teluk Datok. SP1 membuat report Banting 6058/18 (P5) mengenai maklumat yang diterima. SP1 memaklumkan maklumat yang sama kepada ASP Dainie Janilin (SP28);

(n) SP28 telah masuk ke bilik stor dan mendapati mayat si mati dalam keadaan terlentang lengkap berpakaian di atas lantai jubin di sudut tepi dinding kiri bilik stor dan terdapat kecederaan luka di leher si mati. SP28 telah menghubungi pihak forensik IPK Selangor Inspektor Ahmad Sahiri bin Hassan (SP11) untuk datang ke tempat kejadian. SP11 telah mengutip antaranya satu bilah pisau plastik warna hitam jenama KIWI BRAND berkesan darah ditemui di bahagian bawah bahu si mati;

(o) pada jam 3.20 petang Penolong Pegawai Perubatan Hospital Banting Puan Anissa bt Juanis (SP13) sampai di tempat kejadian. SP13 telah membuat pemeriksaan ke atas mayat si mati dan mendapati anak mata si mati telah tiada tindak balas, pernafasan atau denyutan nadi dan tekanan darah tidak dapat direkodkan. SP13 mendapati si mati tiada tanda-tanda kehidupan (*no sign of life*); dan

(p) SP28 telah menghantar mayat si mati ke Bahagian Forensik Hospital Banting untuk bedah siasat. Bedah siasat atas mayat si mati telah dijalankan oleh Dr Ayutimasery bt Abdullah (SP20) pada hari yang sama jam 9.30 malam. SP20 mengesahkan terdapat 20 kumpulan kecederaan dan menyimpulkan sebab kematian adalah tiada bekalan oksigen pada organ-organ badan disebabkan tekanan pada leher (*asphysic due to pressure on the neck*).

FINDING OF THE LEARNED TRIAL JUDGE AT THE END OF THE PROSECUTION CASE

[9] Having considered all the direct and circumstantial evidence presented by the prosecution and upon a maximum evaluation, the learned trial judge found a prima facie case against the appellant. In coming to this decision, the learned trial judge found that all the elements to establish the charges had been proven, and the offence of murder was established by the application of cl (c) of s 300 of the Penal Code. Thus, the appellant is called to enter his defence.

THE DEFENCE CASE

[10] The appellant elected to give his evidence on oath. In summary, his defence is that he is of unsound mind as defined under s 84 of the Penal Code. The appellant also called his mother, Puan Asumah @ Azmah bt Ibrahim

(SD2) and Dr Muhammad Redzuan bin Mohamad Ramlah (SD3) to support his defence.

[11] The learned trial judge had summarised the appellant's defence as follows:

> [53] Tertuduh di Kolej Sultan Abu Samad di tempat bertugas di bahagian perpustakaan. Pada hari kejadian tertuduh pergi berjumpa Pengarah Puan Norhayati (SP19) untuk bertukar ke sekolah lain untuk menjadi Pembantu Makmal. Sebelum pergi berjumpa SP19 tertuduh telah berjumpa dengan Aidah Husnah (SP18) di pejabat pentadbiran dan menyatakan hasratnya untuk bertukar sekolah kerana tertuduh dalam keadaan tertekan. Tertekan disebabkan tertuduh mempunyai gejala insomnia dan kemurungan. Walau bagaimanapun, SP19 tidak membenarkan tertuduh bertukar sekolah. Ini menjadikan tertuduh semakin tertekan.
>
> [54] Tertuduh selepas berjumpa dengan SP19 telah berlegar-legar di kawasan pejabat dan mendengar bisikan 'bunuh' 'bunuh'. Tertuduh cuba melawan bisikan itu dan tertuduh masuk ke dalam pantri dan duduk di atas bangku. Ketika itu SP18 masuk dalam pantri. Tertuduh memberitahu pada SP18 bahawa beliau dalam keadan tertekan. Tertuduh kemudian keluar pantri dan berlegar-legar di pejabat. Tiba-tiba tertuduh ternampak kelibat nenek kebayan dan terdengar suara 'bunuh' 'bunuh'. Kemudian suara itu meminta tertuduh membunuh si mati. Suara itu meminta tertuduh mengambil pisau dan tikam serta cekik si mati. Tertuduh tidak tahu apa yang berlaku selepas itu.
>
> [55] Tertuduh hanya menyedari semasa di stor SP18 masuk ke stor. Tertuduh kemudian memberitahu SP18 bahawa tertuduh telah membunuh si mati bukan dengan niat tetapi suara yang meminta tertuduh membunuh si mati. Tertuduh kemudian meminjam telefon bimbit SP18 dan memberitahu ibu bapa tertuduh dan polis bahawa tertuduh telah membunuh si mati di bawah kemahuan satu suara dan tertuduh ingin menyerah diri.
>
> [56] Tertuduh turut menyatakan bahawa dua minggu sebelum itu tertuduh mendengar bisikan yang sama meminta tertuduh menyembelih ibu dan ayah tertuduh. Tertuduh juga mengatakan semasa beliau ditahan di penjara beliau juga ada mendengar suara yang sama meminta tertuduh membunuh diri dan mencederakan diri. Oleh kerana tidak tahan dengan suara itu tertuduh telah menghantuk kepalanya di gerigi pintu sel penjara sehingga berdarah. Tertuduh kemudian dibawa berjumpa Dr Redzuan (SD3).
>
> [57] Ibu kepada tertuduh (SD2) menyatakan tertuduh pernah memberitahunya yang tertuduh dikacau perempuan dan lelaki India. Tertuduh pada suatu ketika di kebun kelapa sawit menyatakan bahawa tertuduh hendak membunuh beliau dan ayahnya. Manakala Dr Muhammad Redzuan bin Mohamad Ramlan (SD3) yang merupakan Pegawai Perubatan Klinik Penjara Sungai Buluh dalam keterangan mengatakan bahawa kali pertama beliau berjumpa tertuduh pada 13 Ogos 2018 iaitu kira-kira sebulan selepas kejadian mengadu kemurungan dan SD3 telah memberi tertuduh ubat tidur. Kali kedua berjumpa tertuduh pada 21 September 2018 iaitu selepas kembali daripada Hospital Tanjung Rambutan kerana tertuduh memberitahu dia membunuh si mati bukan untuk membalas dendam tetapi dalam

keadaan stress kerana hendak menghadapi peperiksaan dan pengetua tidak membenarkan tertuduh bertukar. Kali terakhir berjumpa tertuduh pada 25 September 2018 kerana tertuduh cuba membunuh diri pada 24 September 2018 di blok sel. Tertuduh ditempatkan di bilik isolasi. Perjumpaan itu di bilik isolasi di mana tertuduh telah menghantukkan kepalanya di gril bilik isolasi. Pada perjumpaan itu tertuduh mengatakan dia mendengar suara halus menyuruh dia menghentakkan kepaianya supaya mati. Tertuduh ditempatkan di bilik isolasi sehingga 24 Oktober 2018. Tertuduh telah diberi ubat anti depresi dimulakan oleh Pakar Psikatri Penjara Sungai Buluh. SD3 setelah mempertimbangkan latar belakang Tertuduh dan peristiwa cuba membunuh diri memberi diagnosa awal Tertuduh mengalami *major depressive disorder*.

[12] In this case, the learned trial judge had allowed the prosecution to call Dr Lan Lyad a/l Anthony (SP29) the Consultant Forensic Psyhiatrist, Hospital Bahagia Ulu Kinta, Tanjung Rambutan, Perak as rebuttal witness. On this point of rebuttal, we should like to observe that the discretion has been, in our view, properly exercised. In this connection we find the statement in KK Wong J (as he then was) in *See Teow Koon v Kian Joo Can Factory Berhad* [2016] MLJU 367; [2016] 1 LNS 375 in the context of a civil dispute to be relevant:

> [41] I am of the following view regarding the calling of a rebuttal witness by a plaintiff after the close of the defendant's case in a civil trial:
>
> (1) under O 92 r 4 of the RC, the court has the inherent discretionary power to allow a plaintiff to call a rebuttal witness as may be necessary to prevent injustice;
>
> (2) I accept *Alrich Development Pte Ltd*, *Zainal bin Kuning*, *Bridges Christoper* and the English cases cited therein on how the court should exercise its inherent discretionary power to allow a plaintiff to call a rebuttal witness. The court may exercise its inherent discretionary power to allow a plaintiff to call a rebuttal witness in the following circumstances:
>
> (a) when the defendant has the legal burden to prove a 'fact in issue' (as interpreted in s 3 of the EA*) or a 'relevant fact' (as understood in* s 3 of the EA) ('matter to be proved by defendant') and the plaintiff need not call the rebuttal witness during the plaintiff's case to disprove the matter to be proved by defendant. When the defendant has adduced evidence during the defendant's case in respect of the matter to be proved by defendant, the plaintiff may apply for leave of the court to call a rebuttal witness to rebut the defendant's evidence regarding the matter to be proved by defendant (please see *Alrich Development Pte Ltd, Zainal bin Kuning* and *Bridges Christoper*); or
>
> (b) a matter which is relevant to the case (as understood in s 3 EA), has arisen ex improviso, namely the plaintiff cannot reasonably foresee or reasonably anticipate that such a matter will arise during the trial (unexpected matter) and consequently, the plaintiff cannot adduce the unexpected matter during the plaintiff's case. the unexpected matter may arise as follows:
>
> (i) the unexpected matter only arises during the cross-examination of the plaintiff or the plaintiff's witness (please see *Zainal bin Kuning*);

(ii) the plaintiff has been misled as regards the unexpected matter (please see *Zainal bin Kuning* and *Bridges Christoper)*; or

(3) the plaintiff has been caught by surprise by the unexpected matter (please see *Zainal bin Kuning* and *Bridges Christoper*);

(4) the rebuttal witness should be able to give evidence to rebut or explain the unexpected matter (please see *Zainal bin Kuning*). The plaintiff should not be allowed to call a rebuttal witness to supplement or confirm the plaintiff's case; and

(5) once the plaintiff has become aware of the unexpected matter, the plaintiff should inform both the court and the defendant of the proposed application to call a rebuttal witness without any unreasonable delay (please see *Zainal bin Kuning*). If there are factual disputes, a notice of application supported by affidavit should be filed.

[13] Having analysed the evidence, at the end of the defence, the learned trial judge found that the defence had failed to prove the defence of unsoundness of mind on the balance of probabilities under s 84 of the Penal Code. Thus, it was concluded that the prosecution had established its case beyond reasonable doubt against the appellant. Accordingly, the learned trial judge and convicted the appellant on the change as proffered against him. He was sentenced to death as provided under the law.

THE APPEAL

[14] Before us, learned counsel for the appellant in his opening gambit attacked the decision of the learned trial judge and further submitted in his oral and written submissions that the decision must be reversed on the following grounds:

(i) that the finding on the prima facie case is patently wrong and cannot stand scrutiny. It seems to us what the learned counsel is in fact submitting is that the appellant should not have been called to his defence. Instead he should be acquitted and discharged at that stage alone; and

(ii) want of appreciation of defence's case; that the defence of unsoundness of mind, having been proved has escaped the attention of the learned trial judge.

OUR DECISION

Ground (i) — Erroneous finding of prima facie case

[15] It is trite that for the prosecution to establish an offence of murder punishable under s 302 of the Penal Code, the prosecution must prove that the deceased died as a result of the injuries suffered; the injuries were caused by the

accused; and the accused's act comes within one or a combination of the limbs under s 300 of the Penal Code.

[16] For convenience, s 300 of the Penal Code provides as follows:

> Except in the cases hereinafter excepted, culpable homicide is murder:
>
> (a) if the act by which the death is caused is done with the intention of causing death;
>
> (b) if, it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
>
> (c) *if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death*; or
>
> (d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the n'sk of causing death, or such injury as aforesaid.

[17] In the present case, the prosecution had relied on cl (c) of s 300 of the Penal Code in that the appellant intentionally caused bodily injuries to the deceased which is sufficient in the ordinary course of nature to cause death. The Federal Court, recently, in *Zulkiple bin Mohamad v Public Prosecutor* [2022] 1 MLJ 479; [2022] 1 CLJ 673 had occasion to examine the ingredients under cl (c) of s 300 of the Penal Code. Speaking for the Federal Court His Lordship Abdul Rahman Sebli FCJ stated the following:

> [27] The locus classicus on cl (c) of s 300 of the Penal Code is the Indian Supreme Court case of *Virsa Singh v State of Punjab* AIR (45) 1958 SC 465; (1958) 1 MLJ (Crl) 579 which has long been accepted as part of our law: see for example *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174; [1976] 1 LNS 159 (FC) *Mohd Asmadi bin Yusof v Public Prosecutor* [2011] 2 MLJ 302; [2011] 1 CLJ 41 (FC) *Murugan a/l Arumugam lwn Pendakwa Raya* [2014] MLJU 1886; [2017] 3 CLJ 377 (FC) *Rusman bin Sulaiman v Public Prosecutor* [2018] Supp MLJ 194; [2013] 4 CLJ 305 (FC) *Mohd Azam Raja Abdullah v Public Prosecutor* [2015] MLJU 2128; [2015] 1 CLJ 1080 (CA).
>
> [28] The elements that the prosecution needs to prove in order to establish a case under cl (3) of s 300 of the Indian Penal Code, which corresponds with cl (c) of s 300 of our Penal Code, were spelt out by Vivian Bose J in *Virsa Singh* and they are as follows:
>
> (a) it must be established that a bodily injury is present;
>
> (b) the nature of the injury must be proved;

(c) it must be proved that there was an intention to inflict that particular bodily injury, that is to say that it was not accidental or unintentional, or that some other kind of injury was intended; and

(d) it must be proved that the injury of the type described, made up of the three elements set out above, is sufficient to cause death in the ordinary course of nature.

[18] The Federal Court also examined on the issue of the type of 'injury' and concluded as follows:

> [46] The law is now settled that it is irrelevant and totally unnecessary to enquire into what kind of injury the accused intended to inflict. As Vivian Bose J said in *Virsa Singh*, the question is not whether the accused's intention is to inflict a serious injury or a trivial one but whether he intended to inflict the injury that is proved to be present. In the present case, the injuries that were proved to be present and which the appellant intended to inflict were the injuries on the deceased's head which fractured her skull.
>
> [47] It is clear therefore that where the prosecution relies on cl (c) of s 300 of the Penal Code, it is not required to prove intention to cause bodily injury of a kind that is sufficient in the ordinary course of nature to cause death. All that is required is proof of intention to inflict the injury that is proved to be present, irrespective of whether the injury is grievous or trivial.

[19] In the present case, based on the evidence before the court, that the deceased died on 11 July 2018 between 1.30pm and 3pm. The pathologist (SP20) who examined the deceased found two stab wounds; one on the left side of anterior aspect of the deceased's neck and another one on the left supra clavicle area (above the collarbone). The stab wounds had penetrated the skin, subcutaneous tissues and muscles. SP20 however opined that the stab wounds were not fatal.

[20] The pathologist further explained that the death of the deceased was caused by asphyxia due to compression or pressure on the neck. SP20 found that the face of the deceased was congested with spot of 'petechiae' (the bursting of blood vessels closes to the skin) and the presence of conjunctive haemorrhage which symptoms were consistent with asphyxiation as the cause of death. Further the lips and fingernails of the deceased were bluish in colour, and this is consistent with asphyxiation. It was also found that there are multiple contusions on lower jaw. These injuries were in keeping pattern with that due to compression by fingers (hands).

[21] In light of the above evidence, it is clear to us that the prosecution had satisfied the first two ingredients. As such, only two more ingredients are left ie, the identity of the person who inflicted the injury and whether the element of intention to inflict that injury.

[22] In this case the prosecution is relying on circumstantial evidence to prove the two elements as there is an absence of an ocular witness. We must at this juncture state that it is trite that circumstantial evidence can be the sole basis for a conviction provided that the condition precedents before conviction on circumstantial evidence are fully established. The conditions are:

(a) the circumstances from which the conclusion of guilt is to be drawn should be fully established;

(b) the facts so established should consistent with the hypothesis of the guilt of the accused; and

(c) circumstances should be conclusive nature and tendency, there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must be shown that in all human probability the act must have been done by the accused.

(see *Magendran a/l Mohan v Public Prosecutor* [2011] 6 MLJ 1; [2011] 1 CLJ 805, *Mazlan bin Othman v Pendakwa Raya* [2012] MLJU 1786; [2013] 1 CLJ 750, *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] CLJ Rep 721, *Chan Chwen Kong v Public Prosecutor* [1962] 1 MLJ 307).

[23] In the present case we agree with the learned trial judge that there are sufficient circumstantiai evidence that proved the nexus between the appellant and the deceased's death. The evidence may be summarised as follows:

(a) recovery of knife (P28(F)(1)) with blood stains next to the deceased;

(b) Dr Nur Haliza Hassan (SP21), the chemist, testified that the knife (28(F)(1)) had blood stains which matched the DNA profile of the deceased. There was also the presence of the deceased's DNA profile on the bloodstain indicated on the appellant's shirt (P28(G)(1));

(c) the evidence of SP9, SP14, SP16 and SP19, although none of them had seen the deceased inflicting the injury on the deceased, they had confirmed that there was no other person at the scene of the crime at the relevant time, except the appellant and the deceased; and

(d) the contents of the CCTV recording (P39(B)(I) and P39(B)(II)) and the relevant still photographs extracted from the CCTV recording (P38) by SP27, which showed the appellant's movement from the pantry towards the store through the administration office while holding a knife.

[24] Further the appellant had before his arrest, confessed to SP18 that he had killed the deceased. The appellant made three statements to SP18 that 'wei aku bunuh kak Zaimah' 'bak sini telefon kau, aku nak telefon mak ayah aku,

polis dan ambulance. Aku nak buat Pengakuan yang aku bunuh kak Zaimah. Ini salah satu cara aku dibuang kerja' and 'aku tidak bunuh kamu sebab baik dan aku bunuh kak Zaimah sebab dendam'.

[25] We have carefully examined the notes of evidence and found that this part of the evidence of SP18 which implicates the appellant in material particulars stood unchallenged by the appellant.

[26] The law on admission and confession are settled. Reference is made to s 17 of the Evidence Act 1950 that provides as follows:

> 17 Admission and confession defined:
>
> (1) An admission is a statement oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which's made by any of the persons and under the circumstances hereinafter mentioned.
>
> (2) A confession is an admission made at any time by a person accused of an offence, stating or suggesting the inference that he committed that offence.
>
> (3) Subsection (2) shall have no application in Sarawak.

[27] It is unnecessary for us to further explain the distinction between an admission and a confession since that had been admirably done by Lord Guest in *Anandagoda v The Queen* [1962] 1 MLJ 289 which we would gratefully adopt. We must state that confession is relevant evidence and in so far as its admissibility, the scheme of the Evidence Act 1950 provides that, first, the confession must be free from vitiating elements as stated in s 24 of the Act, ie, inducement, threat or promise or in accepted legal jurisprudence, as being obtained through oppression. Secondly, if the said confession is made to a police officer, then to be admissible it must be made to a police officer not below the rank of Inspector. This requirement is however subject to any express provision of any written law. Thirdly, if an accused person is in a police custody any confession could only be proved if it is made in the presence of a sessions court judge or a magistrate. This too subject to any express provision of any written law which necessarily means that as it is of general application and written law can provide specific provision to the contrary. In short, the law provides safeguards with regards to:

(a) the circumstances under which the confession was made in that it must be free from the vitiating elements;

(b) if made to a police officer; and

(c) if made in custody of a police officer.

[28] Following from the above there is no requirement that a confession must and can only be made to a police officer or when a person is in custody. It necessarily means that confession can be made to any person and it is relevant and will be admissible evidence provided that it is not vitiated by the circumstances as described above.

[29] In sum and in the context of the present case, the appellant's admission to his friend/colleague SP18 that he killed the deceased, in our judgment, is relevant evidence. It must be mentioned too that SP18 was not a person in authority in relation to the appellant. We find no evidence of that. We also find that there is no evidence of any inducement, threat or promise or any oppression against the accused, appellant. It is evident therefore that the admission was voluntarily made. It bears mentioning that at that point of time, the appellant was not even arrested. Thus, the statements were clearly a full admission of guilt (see *Ho Sek Kong v Public Prosecutor* [2011] 5 MLJ 359; [2011] 6 CLJ 522).

[30] Further, the evidence also showed that the appellant had borrowed SP18's phone and made a telephone call to the police SP1. We are mindful to state that this vouchsafed or lend credence to the appellant's confessional statement within s 17(2) of the Evidence Act 1950.

[31] In our judgment the learned trial judge had applied the correct test arriving at a finding that SP18 was a credible witness and that the appellant's statement to SP18 that he had committed the murder was a very important piece of evidence and pivotal in the determination of the guilt or innocence of the appellant. We also agree that the learned trial judge was right in admitting the appellant's statement as a confession made voluntarily by the appellant.

[32] As alluded to earlier, the prosecution is relying on cl (c) of s 300 of the Penal Code, intentionally cause bodily injuries to the deceased which is sufficient in the ordinary course of nature to cause death. However, the intention to cause death is not and ingredient to be proved for the application of cl 300(c). In the leading case of *Virsa Singh v State of Punjab* [1958] SC 465 Vivian Bose J had stated as follows:

> Once the intention to cause bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference injury is sufficient in the ordinary course to cause death ...

[33] On undertaking an objective assessment it is necessary to look at the evidence and for that purpose we turn to the result of the autopsy on the deceased performed by the forensic expert, SP20.

[34] To reiterate, the deceased had multiple injuries and had died from asphyxia. SP20 in crystal clear terms had testified the deceased had not died from natural causes. The injuries were not self-inflicted. SP20 opined that the cause of the asphyxia was due to compression pressured being applied on the neck by using either hand or fingers. In short, the deceased was forcibly asphyxiated which resulted in reduced levels of oxygen and it could quickly lead to death. SP20 had testified regarding the injuries at encl 12 pp 31–35 as follows:

> Q: Adakah luka-luka selain dari luka tikaman ini fatal jika dilihat dari kedalaman dan keadaan kecederaan?
>
> A: Gabungan luka No. 5, No. 9 dan No. 20 menunjukkan ianya tekanan pada leher. Tekanan pada leher yang merupakan 'fatal in nature'.
>
> Q: Apa maksud 'fatal in nature'?
>
> A : Dalam kes ini ia telah menyebabkan oklusi pada salur pernafasan pada leher dan menyebabkan terhentian bekalan oksigen pada organ.
>
> Q: Tekanan pada leher oleh objek tersebut telah meninggalkan kecederaan pada 5, 9 dan 20. Objek ini sebagai apa?
>
> A: Di dalam kes ini pada pandangan saya merupakan tapak tangan dan jari.
>
> Q: Bagaimana doktor boleh 'come to the conclusion' yang penyebab tekanan pada leher iaitu tapak tangan dan jari. Berdasarkan apa?
>
> A: Pertama saya merujuk pada kecederaan no. 20 iaitu satu kumpulan lebam yang hampir-hampir membulat pada bahagian kanan leher di bahagian hadapan. Kecederaan no. 20 ini konsisten dengan tekanan menggunakan jari. Kesedaran no. 20 ini selalunya dapat dilihat dalam kes-kes cekik.
>
> ...
>
> Q: Melihat kepada kecederaan dan punca kematian si mati dalam kes ini, adakah boleh punca kematian disebabkan oleh 'self inflicted'?
>
> A: Dalam kes ini pada pandangan saya tidak kerana kecederaan 20 menunjukkan ianya disebabkan tapak tangan dan jari. Untuk 'self inflicted' menggunakan tangan dan jari selalunya mangsa akan melepaskan genggaman pada leher apabila pengsan iaitu sebelum mati. Jika cekikan itu disebabkan oleh orang lain kemungkinan besar ianya tidak akan dilepaskan sehingga masa mati. Jadi jawapan saya asphyxia dalam kes ini bukan 'self-inflicted'.

At p 36 encl 12, SP20 expressly said that the injuries were sufficient in the ordinary course of nature to cause death:

> Q: Adakah kecederaan ini pada lazimnya boleh menyebabkan kematian?
>
> A: Tekanan boleh menyebabkan kematian pada lazimnya 5, 9, 20 adalah kecederaan pada luaran yang memberi petunjuk pada kami bahawa satu tekanan dalam kes ini

merupakan tapak tangan dan jari telah dibuat pada leher si mati. Tekanan pada leher tersebut menyebabkan kematian. Pada lazimnya tekanan pada leher, boleh menyebabkan kematian.

[35] It is clear that there are two types of injuries, namely that caused by sharp object and that caused physical act consistent with strangulation the last act being the lethal cause. From the notes of evidence, we find that the evidence that the fact that the deceased's blood was found on the knife was not seriously challenged. It thus could only point to one direction, ie, the knife was indeed used to strike the deceased which was follows followed by manual strangulation that had asphyxiated the deceased, in our view, the circumstantial evidence clearly show intention ie the bringing along a lethal weapon when he met the deceased equates to preparatory act consistent with premeditation. Why need to bring along such a knife when meeting the deceased unless he had murder so vile in his heart. If the stab wounds were not fatal, death was a certainty when the deceased's neck was compressed resulting in failure of oxygen to enter the vital organs. We agree with the learned trial judge that the act of the appellant left no doubt that the intention must have been to take the deceased's life. Therefore, when taken together, its clearly can show that the injuries inflicted were not accidental or unintentional.

[36] Learned counsel, with respect, was unable to point to any specific reasons to support his contention that a prima facie case has not been made out.

[37] Hence, we are of the view that the learned trial judge clearly had not misdirected himself in law and in facts in deciding that the prosecution had made out a prima facie case on maximum evaluation against the appellant for the offence of murder within cl (c) s 300 of the Penal Code.

Ground (ii) — Non-appreciation of defence case, s 84 of the Penal Code

[38] Counsel for the appellant submitted, in essence, that the appellant had established the defence of unsoundness of mind under s 84 of the Penal Code, but the learned trial judge had failed to appreciate such defence. Learned counsel had in summary submitted that the defence has indeed proven that the appellant is under 'medical insanity'. We find that quite apart from the lack of proper terminology used ie insanity as opposed to the term 'unsoundness of mind', the submission rings hollow as it is not supported by evidence.

[39] On this issue, s 84 of the Penal Code states as follows:

84 Act of a person of unsound mind:

Nothing is an offence which is done by a person who, *at the time of doing it, by reason*

of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

[40] It is trite law that the appellant must establish unsoundness of mind as prescribed under s 84 of the Penal Code to exonerate the appellant from the offence charged against him. Hence the burden is shouldered by the defence to prove this defence on the balance of probabilities as decided by the Federal Court in *Goh Yoke v Public Prosecutor* [1970] 1 MLJ 65, and *Rajagopal v Public Prosecutor* [1977] 1 MLJ 6 and *Juraimi Hussin v Public Prosecutor* [1998] 1 MLJ 537; [1998] 2 CLJ 383. This is consistent with s 105 of the Evidence Act 1950 which states:

105 Burden of proving that cases of accused come within exceptions

When a person is accused of any offence, the burden of proving the existence of circumstances bnnging the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same code, or in any taw defining the offence, is upon him, and the court shall presume the absence of those circumstances.

ILLUSTRATIONS

(a) Accused of murder alleges that by reason of unsoundness of mind he did not know the nature of the act. The burden of proof is on A.

[41] In *John a/k Nyumbei v Public Prosecutor* [2007] 7 MLJ 206; [2007] 2 CLJ 509 where the court speaking through Abdul Hamid Embong JCA (as His Lordship then was) stated as follows:

11. This section exempts a person found to be insane of any criminal responsibility if is found that he is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law (see commentary in *Ratanlal and Dirajial's Law of Crimes* (25th Ed) p 280). The learned authors there further commented that a person is not protected if he knew that what he was doing was wrong, even if he did not know that it was contrary to law, and also, if he knew what he was doing was contrary to law, even though he did not know that it was wrong.

12. Thus, under *s 84 Penal Code, criminality has to be determined according to that legal test and not merely by the mental state of an accused person according to the medical test*.

13. There is a distinction between the notion of a legal insanity and medical insanity. Not every form of insanity exempts a person from criminal responsibility. Only legal insanity provides that exemption under s 84 Penal Code. The species of insanity addressed by s 84 is the one that unpair the cognitive faculties of a person. Its nature and extent must be that to make the offender incapable of knowing the nature of his act, or that he is doing is wrong or contrary to law. The criminality of an act therefore must be determined by this test laid down in s 84 as distinguish from the medical test (see *Ratanlal and Dhirajlal's Law of Crimes* (25th Ed) p 280). As was stated recently by this court through the judgment of Ariffin Zakaria JCA (as

A he then was) in *Public Prosecutor v Muhammad Suhaimi Abdul Aziz* [2004] 1 CLJ 378:

> *It is settled law that the defence of insanity under* s 84 *is concerned with the accused is legal responsibility at the time of the alleged offence and not with whether he was medically insane at that time. See Pendakwa Raya v Zainal Abidin Mat Zaid* [1993] 1 CLJ 147 *Public Prosecutor v Misbah Saat* [1997] 3 MLJ 495; [1998] 1 CLJ 759.

B

14. When the defence of insanity is raised the court thus needs to consider two matters, namely:

C

(a) Whether the accused person has successfully established, as a preliminary issue, that at the time of committing the act he was of unsound mind; and

(b) If he was unsound mind, whether he has proven that his unsoundness of mind was of degree to satisfy one of the tests earlier mentioned ie that the accused was incapable of knowing the nature of his act as being wrong or against the law (see *Ratanlal and Dhirajlal's Law of Crimes* (5th Ed), P289 et se 9).

D

[42] Based on the authorities as referred above in cases where the defence of unsoundness of mind is raised, a two-stage test is applicable. Firstly, there must be a finding upon medical evaluation that the accused was suffering from some kind of psychiatric condition that impaired his cognitive faculties at the material time so as to be classified as being medically unsound mind. This is of course a matter for a medical expert to determine. But is not conclusive. Secondly, in order to be legally of unsound mind, the accused must be determined by reason that psychiatric condition to have lost his cognitive faculties to a degree such that he is incapable of knowing the nature of his act or that what he is doing is wrong or contrary to the law, The position is thus clear that once the determination is made as to the medical unsoundness of mind of the accused by medical evidence, it falls upon the court to decide whether by reason of thereof, the accused was incapable of knowing the nature of his act or that what he was doing was either wrong or contrary to law (see *Tiong Ing Soon (L) v Public Prosecutor* [2019] 6 MLJ 542; [2019] 7 CLJ 341, *Public Prosecutor v Zainal Abidin bin Mohd Zaid* [1993] 1 CLJ 147, *Public Prosecutor v Misbah bin Saat* [1997] 3 MLJ 495; [1998] 1 CLJ 759)

E F G H

[43] In the present case, the appellant had called SD3, a government medical officer from Klinik Penjara Sungai Buloh who treated him. It was stated that the appellant to be suffering from *major depressive disorder* because he was exposed to some traumatic events eg:

I

(a) he was offered unwanted college course;

(b) he was heartbroken because his long-time girlfriend broke up with him;

(c) his brother got into a motor vehicle accident; and

(d) he was struggling at work. SD3 opined that the appellant was depressed and he had attempted to commit suicide by various method ie.drinking liquid deodorant, jumping off a motorcycle, drinking cleaning liquids, pesticide etc. SD3 further explained that a person who was suffering from severe depression disorder was likely act aggressively.

[44] To rebut the finding of SD3, the prosecution called Dr Lan Llyod a/l Anthony (SP29), the Consultant Forensic Psychiatrist, Hospital Bahagian Ulu Kinta, Tanjung Rambutan as rebuttal witness. SP29 testified that the appellant was referred to him on three separate occasions ie 18 August 2018, 26 October 2018 and 2 May 2019 and he had prepared three reports as to his findings ie P52, P53 and P54. SP29 was of the opinion that the appellant was fit to stand trial and was capable of making his defence. Based on his assessment, he opined that at the time of the offence the appellant was aware of what he was doing and that he was aware of the nature of his offence and capable of understanding what he had done was wrong and against the law.

[45] SP29 also had interviewed members of the appellant family namely his parent, brothers as well as his colleagues. Based on the interview certain documents were given to him and also the medical reports of the appellant. SP29 found that the appellant had a condition of adjustment disorder with depression mood and the appellant then was treated with some medication. For the first admission, SP29 stated in P52 that the appellant was not showing symptoms of psychosis and mania. Based on the examination, SP29 concluded that the appellant was not experiencing from auditory and visual hallucinations. For the second admission, SP29 also conducted interviews and examination and his diagnosis remained the same ie the appellant had a condition of adjustment disorder with depression mood. As stated in P53, the appellant was not shown symptoms of psychosis and mania. In this respect the appellant's statement of mind at the time of the offence that he was aware of what he was doing was wrong. SP29 also opined that the appellant did not meet the criteria for major *depressive* disorder. SP29's evidence is reproduced as follows:

> Major depressive disorder is a mental serious disorder whereby a patient has to have persistent low mood (*kemurungan teramat sangat*). You cannot react positively to events. Everything around you mean nothing. You must also have diminished interest in all your activity that you do. That means you are unable to go to work, you are unable to carry out your duties at work; you take multiple MC; you cannot get up from bed; you have prolonged duration of sleeping at home; your appetite is reduced; unable to focus; you have sensation of hopelessness and guilty feeling. If you meet all these criteria, then you have a condition of major depressive disorder. Social interaction will be impaired; occupational functioning would also be impaired. In this case from my evaluation, he did not meet the criteria for major depressive disorder. Neither that he has any social and occupational impairment. He can work with the environment.

[46] From the above, SD3 was of the opinion that the appellant suffers *major depressive disorder*, whilst SP29 was of the view that the appellant did not suffer from *major depressive order*. In our judgment, in this situation the court has a right to prefer one opinion to the other and it is trite that a finding that the opinion of one expert witness is to be preferred to that of another is not likely to be disturbed by the appellate court because it is finding made after the trial judge had carefully weighed the respective theories based upon the value, impressiveness and reliability of the expert evidence (see *Muhammad Jeffry bin Safii v Public Prosecutor* [1997] 1 SLR 197, *Mc Lean v Weir* [1997] 5 WWR 609, *Tengku Jonaris Badlishah v Public Prosecutor* [1999] 2 SLR 260).

[47] That said, having scrutinised the totality of evidence, we agree with the learned trial judge that the evidence of SP29 as being credible evidence in comparison with the evidence of SD3. In the grounds of judgment, this is what the learned trial judge concluded:

> [60] Setelah mengatakan sedemikian mahkamah ini mendapati dari segi perubatan tertuduh bukanlah seorang yang menghidap ketidaksempurnaan akal pada masa tertuduh melakukan pembunuhan itu. Keterangan Pegawai Perubatan SD3 gagal menunjukkan hal ini. SD3 tidak pernah dalam keterangannya menyatakan tertuduh mengalami ketidaksempurnaan akal. SD3 hanya menyatakan diagnose awal beliau terhadap tertuduh adalah sebagai 'major depressive disorder'. Pihak pendakwaan telah memanggil Dr Lan Llyod a/l Anthony (SP29) seorang Consultant Psychiatric yang membuat pemerhatian atas tertuduh dan menyediakan laporan psikiatri di bawah s 342 KTJ terhadap tertuduh (P52) sebagai keterangan 'rebuttal'. SP29 menyatakan setelah membuat penilaian yang 'extensive' atas tertuduh beliau dapati tertuduh mengalami 'adjustment disorder with depressed mood' yang rawat melalui ubatan. Apa yang dimaksudkan 'adjustment disorder' dalam kes tertuduh adalah 'an emotional and behavioural disorder' dalam kes tertuduh adalah 'an emotional and behavioural reaction to stressful event'. Semasa diperiksa balas SP29 mengatakan 'adjustment disorder is not a serious mental disorder. Therefore, for committing murder is extrement remote'. SP29 mendapati tertuduh tiada mengalami apa-apa gejala psychosis iaitu simptom halusinasi atau delusi. SP29 juga menyatakan tertuduh tidak mengalami gejala *major depressive disorder*.
>
> [61] Mahkamah ini menerima dapatan yang dibuat oleh SP29 berbanding dengan dapatan SD3. SP29 merupakan pakar dalam bidang psikiatri dan membuat penilaian dan perhatian atas tertuduh dalam tiga pertemuan dengan jangka masa yang lama iaitu pertemuan pertama 18 Ogos 2018 hingga kedua 26 Oktober 2018 hingga 6 November 2018 dan ketiga 2 Mei 2019 hingga 15 Jun 2019 serta temubuai yang berpanjangan dengan tertuduh. SP29 menilai dengan meneliti dokumen laporan perubatan tertuduh dari Klinik Kesihatan Teluk Dato' dan dokumen kolej. Berbanding dengan SD3 yang merupakan Pegawai Perubatan yang tidak mempunyai kepakaran dalam bidang psikiatri yang diakui sendiri. SD3 menemui tertuduh hanya dalam dua pertemuan sahaja pada 13 Ogos 2018 dan 21 September 2018. Dengan itu, dapatan SP29 adalah konklusif dan meyakinkan dan mahkamah menerima dapatan beliau ...

[48] In the final analysis we agree with the respondent's submission that the learned trial judge had not committed any error of law or fact. In our view the issues raised by the learned counsel are devoid of any merit. The appellant had failed to establish the defence under s 84 of the Penal Code.

CONCLUSION

[49] For all the reasons enumerated above we found the conviction of the appellant is safe. We therefore unanimously dismissed the appeal and the conviction and sentence imposed by the High Court is affirmed. We so order.

Appeal dismissed; conviction and sentence imposed by High Court affirmed.

Reported by Dzulqarnain Ab Fatar